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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RANDALL SMITH TAYLOR, Defendant and Appellant.	B203142 (Los Angeles County Super. Ct. No. BA276164)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed.

Lawrence R. Young & Associates and Lawrence R. Young for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Randall Smith Taylor appeals from the judgment entered upon his convictions by jury of first degree murder with the lying in wait special circumstance (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(15), count 1)[1] and attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a), count 2).[2] The jury found the special-circumstance allegation and the firearm allegations within the meaning of section 12022.53, subdivisions (b), (c) and (d) to be true. The trial court sentenced appellant to life without the possibility of parole on count 1 and to a consecutive life term on count 2. To each count, it added a term of 25 years to life for the firearm enhancement in section 12022.53, subdivision (d). Appellant contends that (1) there is insufficient evidence to support his convictions, (2) the trial court erred in failing to grant his motion for new trial made on the ground that the jury conducted its own investigation, and (3) the evidence offered by the eyewitnesses was so unreliable that it should have been stricken from the record.

We affirm.

FACTUAL BACKGROUND

We review the evidence in accordance with the usual rules on appeal. (See *People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Autry* (1995) 37 Cal.App.4th 351, 358.) On the evening of December 18, 2004, Brannen Goodman went to visit a friend at an apartment at 76th Street and Crenshaw Boulevard in Los Angeles. As he pulled into the alley to park, he observed appellant, whom he had seen in the area before, squatting near a dumpster, holding a rifle with a scope in a "combative arm position." Goodman approached appellant and asked what was going on. Appellant responded, "'Not you, homie, not you.'" Gesturing to a house at the end of the alley in which Jamie Bowe lived, appellant said, "'All this dope-dealing around here, around these kids, is about to cease.'" Goodman entered the building.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The jury found appellant not guilty on count 3 for shooting at an occupied motor vehicle (§ 246).

Less than an hour later, Goodman heard two rifle shots, and afterwards, additional shots that sounded like they came from a handgun. Later, he saw appellant carrying a rifle toward an adjacent building. Appellant appeared to be unloading the rifle and entered an apartment. Appellant's wife exited the apartment, appearing distraught, and stated, "Oh, my God, stupid."

At approximately 7:30 or 8:30 p.m., Nicole Roberts was driving her brother, Jonathen Roberts, to his friend's house. She first stopped in an alley near 75th Street and Crenshaw Boulevard to visit her friend, Jamie Bowe. That evening, Bowe and his friends were in his garage, which was used as a game room. Nicole parked in the alley, exited and went inside, leaving her brother in the car. While he waited, Jonathen saw appellant pacing in the alley, and "peek[] around the electric pole," towards Bowe's house. A few minutes later, Nicole returned to the car. As she and Jonathen drove away, they saw appellant point a rifle at their car.

Nicole dropped Jonathen off at his friend's and returned to Bowe's house. She told the people there about the man with the gun. Shortly thereafter, Bowe arrived home from the store with his friend, Oscar Ward.

At approximately 8:15 to 8:30 p.m., Sherman Burrell was parked at the corner of Crenshaw and 76th Street, waiting for Goodman to come outside. He saw a shadow that he thought was a "bum with a stick in his hand." He saw no one else in the area. Within minutes, he heard two gunshots. Two more gunshots, one right after another, were fired into his windshield. These shots sounded close by, but Burrell did not know where they were from. He telephoned the police.

Ricardo Martinez and his wife and daughter were visiting a relative in the area at the time of the shooting. Between 8:00 and 9:00 p.m., as they were leaving, Martinez heard two or three gunshots nearby, a few seconds apart. He and his family went back inside. When they drove away 15 or 20 minutes later, a man crossed their path holding a rifle at his side. Martinez could not identify his face, but described him as African-American, slim, six feet tall, wearing dark pants and a hooded sweatshirt. Martinez saw no one else.

Ward was at Bowe's house during the shooting. After receiving a phone call that a man with a gun was in the alley, he and Bowe went to investigate and saw a man pacing, holding a rifle. They returned to the house. Ward heard two or three gunshots. At Bowe's suggestion, they went on the roof to see what was happening. Ward testified that neither he nor Bowe had a gun.[3] Seconds later, Ward heard another shot and was struck in the back, under his arm, stumbled and fell off the roof. He told Detective Tennelle that he saw the man in the alley pointing the rifle at him. He could not identify appellant as the shooter. As a result of the shooting, Ward underwent surgery and suffered permanent injury to his arm.

Detective Tennelle investigated the shooting. Bowe was found dead on the roof, with a cell phone in his hand and a fully-loaded, nine-millimeter Baretta handgun under his T-shirt. He died of a single "through-and-through" gunshot wound to the head. No spent nine-millimeter shell casings were found at the crime scene. A fully-loaded .357-caliber revolver was also found on the roof, about 15 or 20 feet from Bowe's body. None of the bullets in the revolver had been discharged. At the crime scene, Detective Tennelle found four, live 30-30 rounds, and a beer can in a paper bag near the rear parking lot of 7525 Crenshaw Boulevard. Appellant's fingerprints were found on the paper bag. Nicole identified appellant in a photographic six-pack as looking similar to the man she saw with the rifle. She testified at trial that she was unsure it was appellant. Her brother Jonathen was unable to identify appellant from the six-pack, but identified him at trial.

Appellant was arrested on December 21, 2004, with a semiautomatic rifle with a scope attached, tucked into his pants. The rifle was loaded with a live, 30-30 round in the chamber and six additional rounds in an attached magazine. Appellant had another 30-30 round in his pocket. The four rounds found at the scene were similar to those confiscated from appellant and were made by the same manufacturer. As he was arrested,

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3 Ward did not remember telling Los Angeles Police Department Detective Wallace Tennelle that he and Bowe had guns. Detective Tennelle testified that Ward told him that Bowe took two handguns to the roof and tossed one to Ward.

appellant told officers, "'You guys fucked up. You motherfuckers stopped me before I was going to finish the job.'"

DISCUSSION

I. Sufficiency of the evidence

Appellant contends that there was insufficient evidence to support his convictions. He argues that because there was no ballistic evidence to link the rifle confiscated from him to the shootings, or evidence of his whereabouts at the time of the shooting, "reasonable doubt is overwhelming." This contention is without merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry, supra,* 37 Cal.App.4th at p. 358.) We must presume every fact in support of the judgment that the trier of fact could have reasonably deduced from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* at p. 331.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

Appellant misconceives the applicable standard for reviewing the sufficiency of evidence. While he points to the absence of any eyewitness who saw the shooting, the absence of any ballistic evidence to connect his rifle with the shooting and the absence of evidence that the victims were shot with a 30-30 round, our function is not to evaluate the evidence that was not presented, but to determine whether the evidence that was presented was substantial. We conclude that it was.

Both before the shooting and after, appellant was seen by eyewitnesses in the area, carrying a rifle with a scope. No one else was identified as being in the area with a rifle.

Less than an hour before the shootings, Goodman observed appellant kneeling near a dumpster in the alley, holding a rifle with a scope in a "combative arm position." When approached by Goodman, appellant gestured to Bowe's residence and made the ominously threatening statement, "All this dope-dealing around here, around these kids, is about to cease." This established a motivation for the shootings. After the shooting, Goodman saw appellant carry the rifle to his apartment, unload it before entering, and appellant's wife emerge, visibly upset, and say, "Oh my God, stupid." Nicole and Jonathen stopped near Bowe's house and saw appellant with a rifle. Nicole later identified him in a photographic six-pack and Jonathen identified him at trial. Appellant menacingly pointed the rifle at their car. Other witnesses testified that there was a man with a rifle in the alley, although they could not identify him as appellant.

Appellant was also placed at the crime scene by his fingerprints which were found on a bag recovered in the alley. And when arrested, he had in his possession 30-30 rounds matching those found in the alley. Goodman and Jonathen identified the rifle and scope taken from appellant when he was arrested as looking like the rifle being carried by appellant. When arrested, appellant told the arresting officers that they "stopped [him] before [he] was going to finish the job," a tacit admission of his involvement in the shooting, which supported an inference of his guilt.

While no one actually observed appellant fire the fatal shots, the circumstantial evidence was sufficient to support his conviction beyond a reasonable doubt.

II. Motion for new trial based on jury misconduct

During trial, the rifle and scope confiscated from appellant when he was arrested were admitted into evidence without objection. Before deliberations began, the trial court instructed the jury that it was not to conduct any experiments in the jury deliberation process. After trial, the trial court denied a defense motion to obtain the names and addresses of the jurors, which was based upon a declaration of counsel substantially similar to one filed in support of the motion for new trial, as discussed below.

Thereafter, defense counsel filed a motion for new trial on the ground that the jury acted improperly in experimenting with the rifle scope. He argued that there was no

evidence of appellant's whereabouts at the time of the shooting, the use of the scope, or whether the scope was operational at the time of the shooting, which might justify such experimentation. The motion stated that based upon a discussion with the jury foreman, "it became apparent [to defense counsel] that jurors' experimentation with the scope led to improper speculation about the defendant's possible position and location during the shooting." Counsel's supporting declaration stated that, based upon his questioning of the jury foreman, "[i]t is my belief that during the trial and/or jury's deliberations, jury misconduct or misapplication of the law occurred." The declaration failed to indicate what the jury foreman told counsel.

The trial court denied the motion, finding that "just looking through the scope is not an experiment." The court also noted that the jury did not have much to look at from the jury room window.

Appellant contends that the trial court erred in denying his motion for a new trial. He argues that the prosecution's burden was lightened by the jury experimenting with the scope and discussing the distance from which appellant could have shot the victims, as there was no evidence on the subject at trial. "By doing this experiment and discussing the results, the prosecutor's theory of first degree murder by lying in wait became more probable in the jury's mind." This contention is without merit.

We review the trial court's denial of a motion for new trial de novo. (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 311.) When a party seeks a new trial based upon jury misconduct (§ 1181, subd. 3), the trial court must first determine whether evidence presented for its consideration is admissible, then whether the facts establish misconduct, and finally whether misconduct was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) We conclude that appellant presented no admissible evidence in support of his motion for new trial and hence no evidence establishing misconduct. We therefore need not consider whether there was any prejudicial misconduct.

Evidence Code section 1150 provides: "Upon an inquiry as to the validity of a verdict, *any otherwise admissible evidence* may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a

character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Italics added.)

As this code section makes clear, an affidavit for new trial based on information and belief of misconduct of the jury is insufficient. (See *Stickel v. San Diego Elec. Ry. Co*. (1948) 32 Cal.2d 157, 170; *People v Chin Non* (1905) 146 Cal. 561, 566; *People v. Findley* (1901) 132 Cal. 301, 308 ["affidavit as to the misconduct of the jury, based as it is solely on information and belief, is entitled to no weight"].) Upon seeking a new trial based on jury misconduct, the moving party must present admissible evidence that misconduct occurred. (*People v. Von Villas* (1992) 10 Cal.App.4th 201, 251; see also *People v. Hayes* (1999) 21 Cal.4th 1211, 1258 [out-of-court statements by juror in capital murder case to defense counsel and investigator, in which juror allegedly admitted to acts of juror misconduct, did not come within exception to hearsay rule, and thus were not admissible to establish juror misconduct in connection with defendant's motion for new trial].)

Here, appellant submitted only the declaration of his counsel in support of the motion for new trial, which stated on its face that his claim of improper conduct was based only on counsel's information and belief, and not on matters within his personal knowledge. That belief was derived from inadmissible hearsay as to what the jury foreman told him, and possibly multiple hearsay. Further, the declaration lacked foundation as to the basis of counsel's conclusion that there was jury misconduct, as it failed to state what counsel was told by the jury foreman. Finally, there were no facts in the declaration regarding possible juror misconduct, only counsel's speculation, based upon an undisclosed conversation with the jury foreman.

In short, there was no admissible evidence of jury misconduct to justify granting the motion for new trial.

III. Striking unreliable eyewitness evidence

Appellant contends that the evidence offered by the eyewitnesses was so unreliable that it should have been stricken from the record. He asks that we "completely revalue the evidence and come to [our] own conclusion as to whether there was sufficient evidence to have found the Appellant guilty of first degree murder by lying in wait."

As discussed above, it is axiomatic that it is not our function to revalue evidence. It is within the exclusive purview of the jury to weigh conflicting evidence and inferences drawn therefrom (*People v. Wilson* (1967) 256 Cal.App.2d 411, 420), and to determine the credibility of witnesses (*People v. Hovarter* (2008) 44 Cal.4th 983, 996). One exception is that where testimony is "inherently improbable" a conviction cannot be based upon it. (*People v. Huston* (1943) 21 Cal.2d 690, 693, disapproved on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 350; *People v. Casillas* (1943) 60 Cal.App.2d 785, 794; *People v. Carvalho* (1952) 112 Cal.App.2d 482, 489 [testimony "unbelievable *per se*"].) But to disregard testimony as "inherently improbable," the testimony must be "fantastic" and "do violence to reason, challenge credulity, and in the light of human experience, emasculate every known propensity and passion of people under the conditions testified to by the prosecutrix." (*People v. Carvalho, supra,* at p. 489.) It must "involve a claim that something has been done which it would not seem possible could be done under the circumstances described." (*Ibid.*) "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.]" (*People v. Huston, supra,* at p. 693.)

Appellant claims that contradictions and weaknesses in the testimony of the prosecution witnesses warranted exclusion of the testimony. For example, Ward's testimony that he did not have a gun on the roof conflicted with Detective Tennelle's testimony that Ward told him that Bowe took two guns to the roof and tossed one to Ward and that two guns were found on the roof. Appellant points out that Martinez was unable to identify him as the person he saw with the gun, and Nicole only identified

appellant as looking similar to the person who had the gun in the alley. The short answer to this argument is that none of the contradictions or gaps in the witnesses' testimony reflects inherently improbable or physically impossible testimony. The evidence presents nothing more than the sort of conflicts and inconsistencies seen in most cases, which are precisely those which are for the jury to assess.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ